

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAULA RENAI BENNETT,

Defendant-Appellant.

FOR PUBLICATION

November 2, 2010

No. 286960

Wayne Circuit Court

LC No. 07-024733-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYRON DARELL BENSON,

Defendant-Appellant.

No. 287768

Wayne Circuit Court

LC No. 07-024733-FC

Advance Sheets Version

Before: METER, P.J., and BORRELLO and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur in the majority's affirmance of the convictions of defendant Kyron Benson in Docket No. 287768. I do not believe that any of the issues raised by Benson have merit and, further, the evidence against him for the murder of the victim was overwhelming.

It is in part because of the overwhelming evidence against Benson that I must dissent from the affirmance of defendant Paula Bennett's conviction in Docket No. 286960. Bennett was convicted of aiding and abetting a first-degree murder that was committed by her boyfriend, Benson, because she told him where the victim lived and helped direct him there. However, I find no evidence in the record to support a conclusion that Bennett wanted the victim to be harmed, let alone killed. Further, I conclude that the nature of the criminal jury instruction on aiding and abetting failed to have the jury consider the fundamental issue in this case, i.e., whether Bennett subjectively knew, i.e., believed, that Benson intended to kill at the time she provided assistance. Rather, the instruction asked the jury to make a determination based on an objective test, i.e., whether a reasonable person would or should have known of Benson's intent. Therefore, I do not believe that we can determine whether the jury found that Bennett had the

necessary subjective intent, and so I would reverse the conviction and remand for a new trial. I further conclude that if reversal were not required on this basis, the case would still have to be remanded for a *Ginther*¹ hearing.

Finally, while it may be of little consequence to this defendant, I believe that the Legislature should consider amending MCL 767.39 and MCL 750.316 to modify the statutory punishment for aiding and abetting first-degree murder. Given the wide range of culpability within the scope of the broad definition of aiding and abetting, I believe that sentencing judges should have the discretion to sentence an aider and abettor of first-degree murder to any term of years, life with parole, or life without parole.

I. FACTS RELATING TO THE INTENT AND KNOWLEDGE OF BENNETT

The victim, Stephanie McClure, had stayed for several days at the apartment shared by Benson and Bennett. When McClure left their apartment, she allegedly stole several items.² Bennett reported the theft to the police. She repeatedly stated that she simply wanted her things back and did not want any harm to come to McClure, whom she had known for many years and considered a friend.

There is no evidence that Bennett wanted Benson to harm, let alone shoot, McClure. Although Benson made many threats against McClure, there is no evidence that Bennett joined in the threats or approved of them. To the contrary, the evidence demonstrates that Bennett repeatedly disagreed with Benson when he made these threats and that when he made them, she “cried and freaked out,” “[a]nd she didn’t want him to do it.” Indeed, at one point when Benson insisted that Bennett help him carry out his threats, Bennett stated: “No, I can’t do it. I’m not like you.” According to a witness to this interaction, Bennett was crying and “made it very clear to him that she thought it was over because she had went and made a police report. But he just kept yelling.”

Bennett’s response to the theft was to take the appropriate and lawful action, i.e., going to the police to report the theft. It is difficult to understand why Bennett would identify herself to the police and link herself to accusations against McClure if her intent was to kill McClure or if she believed or expected that her boyfriend was going to kill McClure.

In addition, Benson’s threats waxed and waned, and sometimes he indicated his agreement with Bennett that they should just get their things back from McClure and that could be the end of the dispute. Consistent with that fact, the uncontradicted testimony of Jessica Fritz was that when Bennett and Benson left their apartment to go to McClure’s home, “Paula came out to tell me that they were leaving to go get their stuff back from [McClure] and her house keys that [McClure] had.” Bennett’s behavior following the shooting was consistent with her statement that her expectation was that they were going to get their things back and that she did

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² Although the record does not contain evidence that the victim committed theft, it was not disputed by the prosecution.

not expect violence. Although Bennett did not see Benson shoot McClure, she heard the shots. Her reaction was to immediately begin to cry. Upon arriving at her apartment shortly thereafter, Bennett displayed shock and distress. A witness testified: "I woke up to her slamming and opening the door, opening the door real wide. Her eyes were real big. Her hands were shaking like this and she's crying."

Four witnesses other than Bennett heard Benson's threats against the victim. Three of them testified that they did not believe that Benson would carry them out. Further, none of them took any action to prevent the killing because they did not believe Benson would actually carry out his threats. Fritz testified that she heard threats by Benson. She testified that she did not like Benson "because of the things he did to [Bennett]."³ Fritz testified that she heard Benson make several threats to kill the victim, but that she did not believe he actually intended to because, "I didn't think he was stupid enough to shoot somebody." She further testified that when Bennett told her that Benson had shot the victim, "I didn't believe her at all. My mind was, I was in shock basically. . . . I thought she was lying."

Most significant in this regard was the testimony of Michael Larvaidan. Larvaidan knew Benson and rode with him and Bennett to the trailer park in which McClure lived. He testified that, during the drive, Benson did threaten to kill McClure, but he did not believe that Benson would actually do so. The question was put to him directly during his testimony:

Q. Did you really expect that he was going to kill anybody?

A. No.

In addition, Larvaidan testified that he had spoken with Benson two or three times by phone earlier in the day and that while Benson had seemed upset about the theft, he stated only that he was going to get his stuff from McClure and made no threats against her. Indeed, Benson's action in stopping on the way to McClure's trailer to pick up Larvaidan and bring him along for the ride would not appear, to an observer, to be consistent with an intent to commit a murder. Larvaidan testified that he sat in the front passenger seat next to Benson, that during the 10-minute drive he told Benson to cool down and not do anything stupid, and that he had previously calmed Benson down in situations when Benson was angry. He testified that after he told Benson to calm down, Benson did not repeat the threat to shoot McClure.

One witness, Breanna Kandler, testified that she believed Benson's threats were serious. Kandler went with Bennett to the police department to report the alleged theft by McClure. She testified that after making the police report, she and Bennett picked up Benson, who had known of the alleged theft before Bennett made the police report. She testified that during the drive, Benson was threatening to kill McClure, during which, as already noted, Bennett was "crying and freaking out." She testified that Bennett "was scared. And she didn't want him to do it."

³ At the preliminary examination, Fritz testified that she had previously witnessed Benson beating Bennett.

Kathleen McIntyre, another witness, thought Bennett had “made it very clear to [Benson] that she thought it was over because [Bennett] had went and made a police report. But [Benson] just kept yelling” despite the fact that Bennett told him several times that she had made a police report and that was all they should do. According to McIntyre, Benson alternated during this conversation between threatening to kill McClure and saying that all he wanted to do was get his stuff back from her. Fritz corroborated this with her testimony that in her statement to the prosecutor’s office she stated that Benson “was talking about people walking all over [Bennett]” and that Bennett indicated that she wanted to let the police handle it.

The prosecution never argued that the evidence supported a finding that Bennett wanted Benson to shoot the victim or, indeed, harm her in any way. Further, the evidence overwhelmingly supports a determination that Bennett’s purpose in going to the trailer park was to get her belongings back from McClure, that she did not want McClure hurt, and that although Benson had made remarks regarding wanting to kill McClure, Bennett did not believe that Benson intended to shoot McClure and, like Larvaidan who was also in the vehicle, was shocked that Benson had done so. The uncontradicted evidence clearly supports the conclusion that Bennett did not share Benson’s intent to harm, shoot, or kill McClure and that she did not intend to aid Benson in committing murder by directing him to the trailer park. Rather, the evidence supports the view that Bennett believed that she was directing Benson to McClure’s residence in the hopes of reacquiring the belongings McClure had allegedly stolen from her. Bennett’s reactions to the murder displayed shock and distress, not satisfaction. The other person in the car at the time of the shooting did not believe that Benson was going to shoot McClure, and three others who heard the threats did not consider them credible. The only one who did believe the threats to be credible testified that Bennett was frightened by Benson and that Bennett did not want McClure harmed.

II. AIDING-AND-ABETTING INSTRUCTION

The trial judge gave CJI2d 8.1, the criminal jury instruction on aiding and abetting. As a general rule, this instruction properly sets forth the required proofs for an aiding-and-abetting conviction. However, the instruction does not clearly address the very specific question of intent raised in this case. Therefore, I conclude that the instruction could not assure that the jury considered and decided the central question in the case, i.e. whether Bennett gave assistance to the killer for the purpose of aiding him in his crime.

The instruction sets forth three elements. The first is that the crime was committed. That is not at issue in Bennett’s appeal, because Bennett does not now assert that Benson did not murder the victim.⁴ The second element is that “before or during the crime, the defendant did something to assist in the commission of the crime.” The use of the verb form “to assist” is confusing in that it can be interpreted to mean either that the defendant acted in order to assist in the commission of the crime or that the defendant’s action, though not intended to aid in the commission of a crime, had that result. The third element provides that “the defendant must

⁴ But see the discussion later in this opinion regarding ineffective assistance of trial counsel due, in part, to the decision to argue that Benson did not commit the murder.

have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance.” I believe the phrase “must have known,” rather than “knew,” converts the standard from a subjective one to that of a reasonable person. While this is of little consequence in most cases in which the action in question could not have had any purpose other than assisting the commission of the crime, I believe it was central to the verdict in this case.

As already discussed, there was no evidence that Bennett wanted this crime to be committed. Indeed, the prosecutor recognized this when she stated in closing argument: “I’m not going to stand here and tell you that Paula Bennett wanted [Benson] to kill [McClure] necessarily. . . . I don’t have to prove that.” The question for the jury, then, was whether Bennett “must have known” that Benson intended to kill McClure. This instruction is capable of allowing a conviction based on gross negligence by Bennett because it readily allows the jury to apply a “should have known” standard. If, whether because of stupidity, fear, self-delusion, or some other reason, the aider provides the assistance with the genuine subjective belief that it will not aid in a crime, then our system, which is based on personal culpability, cannot countenance a murder conviction. See *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1992) (“[T]o be convicted of aiding and abetting first-degree murder a defendant must . . . participate in the crime while *knowing* that a coparticipant possessed the requisite intent.”), overruled in part on other grounds by *People v Perry*, 460 Mich 55, 64-65 (1999) (emphasis added).

Under our law, those who commit a homicide because of gross negligence, rather than as a result of an intent to kill, are guilty of involuntary manslaughter, not murder. The statutory punishment for involuntary manslaughter, while severe, is very different from that imposed for murder. It is difficult to understand, then, why someone who did not kill, but who, through gross negligence, aided a killer, should be sentenced as a murderer. Therefore, at least in the context of this case, the proper third element of the aiding-and-abetting instruction should require that “the defendant must have given the assistance with the intent that it aid in the commission of the crime” rather than that the defendant “must have known” what the killer’s intent was.⁵

After a full and detailed review of the record, I conclude that there is a substantial likelihood that Bennett was convicted on the basis of a finding that she was grossly negligent in

⁵ This case is fundamentally different from that analyzed in *People v Kelly*, 423 Mich 261; 378 NW2d 365 (1985). In *Kelly*, the Supreme Court concluded that subjective knowledge of the precise crime ultimately committed was not an element of the offense of aiding and abetting, provided that the crime “was fairly within the criminal plan” *Id.* at 278. Thus, although subjective knowledge of the precise offense ultimately committed is not required, there must still have been some “criminal plan” that the aider was aware of and chose to aid. This principle has since been applied, for example, to cases of armed robbery in which the abettor was aware of the intent to rob, but not that his or her coperpetrator planned to use a weapon. See, e.g., *Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975); *People v Young*, 114 Mich App 61, 65; 318 NW2d 606 (1982). Under *Kelly* and the other cases following it, the abettor must still be a voluntary participant in a criminal plan. The issue in this case, which the jury did not answer, is whether Bennett understood at all that she was assisting in a criminal enterprise.

failing to recognize that her boyfriend intended to commit a murder at the time she provided the assistance. In the context of the unusual facts of this case, the criminal jury instruction creates a standard that allows for conviction of first-degree murder, not on the basis of an intent, but on the basis of gross negligence.

Bennett argues that there was insufficient evidence of her subjective intent and so her conviction should be vacated. While this is a close question, I conclude that a reasonable jury could infer that Bennett did subjectively know that Benson was going to the victim's house to kill her rather than simply recover the stolen property. However, the jury was never clearly asked to determine that question. Rather, the instruction could readily have been read to permit, *if not require*, that the jury apply an objective standard. In my view, Bennett's argument that the jury could not have found sufficient evidence of subjective intent implicitly raises the question whether the jury understood that this is what it was to determine. I recognize that defense counsel did not request a modification of the jury instruction. I believe that this failure to request a modification of the central jury instruction fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Smith v Spisak*, 558 US ___, ___; 130 S Ct 676, 685; 175 L Ed 2d 595, 604 (2010); *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). And, as already discussed, I conclude there were multiple other errors that also contribute to my view regarding whether Bennett received effective assistance.

Our system is not perfect and should not be held to a standard of perfection. However, I do not believe that we can affirm a conviction of first-degree murder—particularly one based solely on an aiding-and-abetting theory—when the jury was not properly advised what the fundamental question was that it was to answer. We should not uphold the imposition of a sentence of life without parole when there remains a serious question whether the jury accurately understood the nature of the element of the offense primarily at issue. For this reason, I conclude that Bennett's conviction should be reversed and the case retried with a proper instruction, i.e., one that explicitly requires that the defendant's actions were taken with the actual knowledge that the assistance they provided would be used to accomplish a murder or some criminal plan in which the murder of the victim was “fairly within the criminal plan” *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985).⁶

III. INEFFECTIVE ASSISTANCE OF COUNSEL

As already discussed, I believe defense counsel's failure to request a proper instruction on the only element at issue constituted ineffective assistance of counsel. However, I also conclude that, even absent that error, other actions by defense counsel would require that we remand this case for a *Ginther* hearing.

⁶ See n 5 of this opinion.

There was overwhelming evidence that Benson committed this cold-blooded murder. Further, there was no evidence to contradict the testimony of Larvaidan that Bennett provided Benson with the location of the victim's trailer. Both the practicality of trial tactics and the actual events as related by multiple witnesses mandated the defense that Bennett did not believe that Benson would murder the victim and that she did not want any harm to come to the victim. In terms of trial strategy, the entire defense effort would have to focus on separating Bennett's actions from Benson's in the eyes of the jury.

Even Benson's counsel expected that this would be the core of Bennett's defense, because before the onset of trial, he moved to sever his client's case from Bennett's. Benson's counsel filed an affidavit that stated "[t]hat the defenses [of Benson and Bennett] are antagonistic and [Benson] will contend that he had nothing to do with the murder of Stephanie McClure[. T]herefore *the defenses will be mutually exclusive and irreconcilable and not simply inconsistent.*" (Emphasis added.) Benson's counsel recognized that the evidence of Bennett's own statements that Benson shot the victim would be admissible at a joint trial because, although they were out-of-court declarations, they were the statements of a defendant and therefore admissible under MRE 801(d)(2). At the hearing on Benson's motion, the prosecutor objected to separate trials, but indicated that she would not object to separate juries. Benson's counsel was satisfied with this approach because it ensured that his client's jury would not hear Bennett's statements that Benson shot the victim. Bennett's counsel made no argument at the hearing, and the trial court entered an order for a single trial with separate juries.⁷

Bennett's counsel originally appeared to recognize his client's best defense because he argued at the preliminary examination:

[T]he evidence I heard, at least indicates that [Bennett] spent all day trying to, um, basically diffuse [sic] this situation. She kept repeatedly saying all she wanted was her property back, and that she didn't want anybody to be injured or killed.

* * *

And, also from statements, first that, uh, she had indicated that she was trying to calm things—that the testimony indicated that she was trying to calm things down, and, no matter how aggravated, uh, Mr. Benson may have been.

⁷ In retrospect at least, the decision to allow the cases to be tried together, but with separate juries, left Bennett with the worst of both worlds. The Bennett jury heard all the details of Benson's cold-blooded murder and were presumably justifiably outraged. In addition, they saw the two defendants and their counsel put forward a unified defense. However, the only person they could punish was Bennett. Had Bennett's case been tried separately, much of the evidence concerning Benson would not have been received by the jury. Had the two cases been tried before a single jury, that jury's outrage would have focused primarily on Benson, rather than falling solely on Bennett.

Secondly, uh, that she disbelieved that he was gonna act. I think that these two things are inconsistent with being an aider and abettor.

However, at trial, Bennett's counsel did little, if anything, to present this defense. Instead, he adopted what appeared to be a "team" strategy with Benson's counsel and even during closing focused on the premise that Benson did not kill McClure:

My client is not charged with killing anybody. What she is charged with is what's called aiding and abetting. In order to be guilty of aiding and abetting, the first thing, and this is as [the prosecutor] said, regardless of the other jury, you have to be convinced that Kyron Benson committed a murder. Because if he's not guilty, she didn't aid and abet him.

Given that Bennett's jury, unlike Benson's jury, had heard multiple witnesses testify that Bennett told them that Benson killed McClure, it is difficult to fathom why her counsel tried to argue to the jury that Bennett should be acquitted because Benson did not commit the murder. This was even more peculiar given Larvaian's eyewitness testimony clearly demonstrating that Benson committed the murder. Nevertheless, in his closing argument, Bennett's counsel spent more time arguing that there was reasonable doubt regarding the guilt of Benson than he did arguing that despite Benson's evident guilt, Bennett should not be convicted of aiding and abetting. This bizarre focus on Benson's possible innocence was not merely a useless argument; it was wholly counterproductive because, by "defending" Benson, Bennett's attorney linked her fate to his. If Bennett's counsel was going to argue that Benson did not kill McClure in the face of all the evidence to the contrary, including Bennett's own statements, he greatly undercut the argument that Bennett did not know Benson intended to kill McClure. By tying Bennett's defense to Benson, rather than conceding Benson's guilt and focusing solely on Bennett being in the wrong place at the wrong time and not realizing what Benson was going to do, Bennett's counsel created a scenario that made it appear as though both defendants were in the scheme together, making Bennett's best defense seem even less probable.

The perception that defendants were trying the case together was only enhanced when Benson's counsel deferred to Bennett's counsel to conduct the entire cross-examination of the medical examiner. Why Bennett's counsel chose to conduct that examination on behalf of both defendants remains a mystery, particularly given that the medical examiner's testimony had nothing to do with Bennett's defense. Indeed, during closing arguments, Bennett's counsel told the jury, "We spent a lot of time listening to evidence and a lot of it didn't have a darn thing to do with my client." The decision to have Bennett's counsel cross-examine the medical examiner only served to further connect both defendants in the jury's mind, thereby creating prejudice to Bennett.

In addition, I question Bennett's counsel's decision not to impeach Kandler with her preliminary-examination testimony. Kandler was the only witness who testified at trial that she believed Benson's threats. However, Kandler admitted at the preliminary examination that in her statement to the police, she wrote that she "didn't really think he was gonna do it," meaning she didn't think Benson was going to kill McClure. Kandler further testified at the preliminary examination that she thought Benson was "just blowing off steam" and agreed that she never actually thought that Benson was going to kill somebody that evening. At trial, when *Benson's* attorney attempted to question Kandler regarding her previous statements, the trial court

sustained the prosecution's objection that whether Kandler thought Benson was serious was irrelevant. Although Kandler's testimony may have been irrelevant with regard to Benson, it was certainly relevant with regard to Bennett, particularly given that Kandler was the only person to testify at trial that she believed Benson's threats. However, Bennett's counsel never challenged the trial court's ruling regarding the relevancy of Kandler's previous statements about Bennett and, therefore, foreclosed his opportunity to impeach the only witness who indicated that Benson's threat seemed worthy of belief.

To the extent that one may argue that the instructional error was waived, I question the decision of Bennett's counsel not to request an instruction on being an accessory after the fact. Granted, it is arguable that her attorney elected to go for an "all or nothing" defense, which is not necessarily ineffective assistance of counsel. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). However, given that the price of that decision was to risk life in prison without the possibility of parole, I believe that this should be explored at a *Ginther* hearing as well.⁸

Finally, although I recognize that the law does not require an on-the-record waiver of a defendant's decision not to testify, *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985), I am concerned about the lack of such a record under the circumstances of this case. Given the nature of the defense presented, it certainly would have been helpful to a reviewing court to have a record of the nature of Bennett's understanding regarding her rights and the risks and benefits of testifying.⁹ As with the other issues just discussed, I believe this issue should be explored at a *Ginther* hearing.

IV. SENTENCING AND THE PRINCIPLE OF PROPORTIONALITY

While it may be of little consequence to Bennett, I suggest that this case is an example of why the Legislature should consider amending MCL 767.39, which mandates that someone convicted of aiding and abetting be subject to the same punishment as the primary offender. Under our system of indeterminate sentencing, a trial court retains broad discretion in fashioning the sentence of the abettor based on his or her individual culpability, extent of involvement,

⁸ I recognize that the trial court would not have been required to give this instruction. *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). However, it would have been within the trial court's discretion to do so. *Id.* at 63 n 19. Further, given the risk that Bennett's "jury might have chosen to convict [her] not because it [was] persuaded that [she was] guilty of capital murder, but simply to avoid setting [her] free," *id.* at 73-74 (BRICKLEY, J., dissenting) (quotation marks and citations omitted), it seems unreasonable for her counsel not to have attempted to provide an avenue for the jury to punish Bennett without subjecting her to imprisonment for life without parole.

⁹ This might also have cleared up any concerns arising out of statements made by Bennett's counsel at the preliminary examination that Bennett had been beaten by Benson and "there may be a basis for her being fearful of [Benson] [t]hat might lead her to, uh, say things that would be more harmful to herself and protective of [Benson]."

intent, and other factors. Thus, although the abettor will receive the same statutory maximum, his or her minimum term will vary, depending on the circumstances, from that of the primary offender. One could argue that such discretion is required by due process given that the ultimate basis for our criminal law is individual culpability. “[T]he criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability.” *Mullaney v Wilbur*, 421 US 684, 697-698; 95 S Ct 1881; 44 L Ed 2d 508 (1975), cited with approval by the Michigan Supreme Court in *People v Aaron*, 409 Mich 672, 711; 299 NW2d 304 (1980).

However, in the setting of first-degree murder, the sentence is not indeterminate. It is determinate—life in prison without the possibility of parole. I question whether a blanket application of that punishment to an abettor, regardless of the circumstances and his or her individual level of culpability, is consistent with due process. It is certainly not consistent, at least in some cases, with the principle of proportionality. See *People v Bennett*, 241 Mich App 511, 517; 616 NW2d 703 (2000) (“By sentencing defendant to life imprisonment, the sentencing court ‘has left no room for the principle of proportionality to operate on an offender convicted of [criminal sexual conduct] who has a previous record for this kind of offense or whose criminal behavior is more aggravated than in [defendant’s] case.’”), quoting *People v Milbourn*, 435 Mich 630, 668-669; 461 NW2d 1 (1990) (alterations in *Bennett*); see also *People v Smith*, 482 Mich 292, 305; 754 NW2d 284 (2008) (“[T]he appropriate sentence range is determined by reference to the principle of proportionality; it is a function of the seriousness of the crime and of the defendant’s criminal history.”) (citation omitted). Thus, I respectfully suggest that the Legislature consider allowing the sentencing court some degree of discretion in sentencing defendants who are found guilty on an aiding-and-abetting theory when the primary offense carries a determinant sentence.

V. CONCLUSION

In a system of justice based on individual culpability, I do not believe we can properly affirm a first-degree-murder conviction purely on the basis of an aiding-and-abetting theory when there is a serious question whether the jury ever made a determination regarding the defendant’s subjective intent, knowledge, and individual culpability. Thus, I believe we should reverse Bennett’s conviction and remand her case for a new trial. Alternatively, I believe we should remand her case for a *Ginther* hearing to address the concerns regarding her representation I have raised in this dissent.

/s/ Douglas B. Shapiro